Interpretation of Article II(3) of the New York Convention*

New York Konvansiyonu Madde II(3)'ün Yorumlanması

Mertcan İPEK**

ÖZET

New York Konvansiyonu madde II(3), bir İmzacı Devlet mahkemesinin, davanın tarafları arasında uyuşmazlığın konusuna ilişkin geçerli bir tahkim sözleşmesi varsa, işbu davanın taraflarını tahkime yönlendireceğini öngörmektedir. Öte yandan, aynı hüküm, bu kuralın istisnalarını da düzenlemektedir. Buna göre, eğer bir tahkim sözleşmesi "hükümsüz, etkisiz veya ifa kabiliyetinden yoksun" ise, geçersiz sayılacaktır. Bu makalede, söz konusu istisnaların anlam ve kapsamı incelenmektedir.

Anahtar Kelimeler: *New York Konvansiyonu, tahkim sözleşmesi, geçerlilik, hükümsüz, etkisiz, ifa kabiliyetinden yoksun*

ABSTRACT

Article II(3) of the New York Convention prescribes that the court of a Contracting State shall refer the parties of an action to arbitration, if there is a valid arbitration agreement between the parties regarding the subject matter of the dispute. On the other hand, the same provision sets forth the exceptions of this rule. Accordingly, an arbitration agreement would be deemed as invalid if it is "null and

* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter 'New York Convention' or 'Convention'].

** WIPO Tahkim ve Arabulucuk Merkezi'nde Dava Yöneticisi
Case Manager at WIPO Arbitration and Mediation Center

void, inoperative or incapable of being performed". This paper analyzes the meaning and scope of the said exceptions.

Keywords: *New York Convention, arbitration agreement, validity, null and void, inoperative, incapable of being performed*

1. Introduction

The principle obligation that the New York Convention imposes upon the Contracting States is that foreign arbitral awards are recognized and enforced by their courts as if they were domestic judicial judgments.[1] However, the scope of the Convention is not limited to arbitral awards but also extends to arbitration agreements, which shall be enforced by the Contracting States, provided that the prerequisites listed in Article II are fulfilled. This provision aims at maintaining the effectiveness of arbitration against the likelihood of respondents' efforts to avoid arbitration[2] or delay the arbitral proceedings through bringing the matter before national courts.[3]

The third sub-clause of Article II provides that the courts of the Contracting States, which are seized of an action, shall refer the parties to arbitration in the presence of a valid arbitration agreement as regards the same matter and between the same parties. When the "referral to arbitration" comes into question, the options of a domestic court are to stay the proceedings, to dismiss the claim on the basis of lack of

---

1 Carolyn B. Lamm & Jeremy K. Sharpe, *Inoperative Arbitration Agreements Under the New York Convention*, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 297, 297 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

2 Dorothée Schramm, Elliott Geisinger & Philippe Pinsolle, *Article II*, *in* Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 37, 95 (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010), Kluwer Arb., http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-1031008-n (last visited Apr. 24, 2016).

3 Jack Graves, *Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?*, 23.1 The Am. Rev. of Int'l Arb. 113, 115 (2012), Digital Commons at Touro L. Ctr., http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1634&context=scholarlyworks (last visited Apr. 24, 2016).

jurisdiction[4] or to compel the parties to arbitrate the dispute.[5] The stay of proceedings is defined as a defensive action taken by the court; whereas compelling parties to arbitrate is described as an offensive action.[6] The latter would only be possible in common law jurisdictions, whereas in civil law countries, courts would not be empowered to compel the parties to arbitration.[7] However, this difference between civil and common law jurisdictions will not create any problem in practice because even if one of the parties refuses to arbitrate and to appoint an arbitrator despite a court's stay order, it would not prevent the arbitral tribunal from deciding the matter, since many arbitration laws have "gap-filling mechanisms of court intervention for the appointment of arbitrators".[8]

If the requirements set forth in Article II(3) are satisfied and the domestic court of a Contracting State still rejects to refer the parties to arbitration notwithstanding its obligation to do so under the New York Convention, the decision rendered by that court would carry a high risk of not having a *res judicata* effect[9] and encountering refusal of recognition and enforcement before foreign courts.[10] Article V of the Convention, which regulates the grounds for refusal of the recognition and enforcement of arbitral awards, stipulates that the arbitration agreement must be in compliance with the requirements of Article II. Therefore, Article II does not only play a role in the pre-award stage, since the review of the validity of the arbitration agreement within the framework of Article II is fundamental to guarantee a successful enforcement at the post-award stage.[11]

---

4 Int'l Council for Com. Arb., ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges 38 (2011), Arb. ICCA, http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf (last visited Apr. 24, 2016).

5 Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28.3 Hous. J. of Int'l L. 663, 689 (2006), Hjil, http://www.hjil.org/articles/hjil-28-3-graffi.pdf (last visited Apr. 24, 2016).

6 Lamm & Sharpe, *supra* note 2, at 319.

7 Graffi, *supra* note 6, at 689.

8 *Id.* at 689.

9 Lamm & Sharpe, *supra* note 2, at 320.

10 Schramm, Geisinger & Pinsolle, *supra* note 3, at 111.

11 Graffi, *supra* note 6, at 669-670.

The obligation of the Contracting States' domestic courts to refer parties to arbitration is dependent upon the fulfillment of the requirement that there is a valid arbitration agreement in terms of Article II and within the scope of the Convention.[12] According to Article II(3), which is the main focus of this paper, national courts have the right to deny to refer parties to arbitration in the case that factual or legal circumstances bring the validity or the efficacy of the arbitration agreement into question.[13] The exceptions listed in Article II(3) cover the cases where the arbitration agreement in question is construed as "null and void, inoperative or incapable of being performed".[14] If the domestic court finds that one of these exceptions exists as regards the given arbitration agreement, it will be allowed to hear the case on the merits.[15] However, as there is no further definition of the terms "null and void, inoperative or incapable of being performed"[16], it is hard to say that the Convention provides any guidance for the interpretation and application of Article II(3).[17] Other important issues that are left undetermined by Article II are the applicable law, the burden of proof and the standard of proof to be used in the analysis as to whether the court will refer parties to arbitration.[18] The main reason of these deficiencies in the provision is shown as the fact that Article II was added to the Convention in the last days of the negotiations and the time to draft it was extremely limited.[19] Due to the lack of clarity in the Convention,

---

12 John Ja Burke, *A Gateway Question of Arbitrability: The Ambiguity of Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*, 2015 Slovn. Arb. Rev. 3, Selected Works, works.bepress.com/john_burke/9/download/ (last visited Apr. 24, 2016).

13 Domenico Di Pietro, *General Remarks on Arbitrability Under the New York Convention*, *in* Arbitrability: International and Comparative Perspectives 85, 94 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

14 New York Convention, *supra* note 1, art. II(3).

15 Schramm, Geisinger & Pinsolle, *supra* note 3, at 113.

16 Lamm & Sharpe, *supra* note 2, at 298.

17 Gary B. Born, International Commercial Arbitration: Commentary and Materials 160 (2001).

18 Lamm & Sharpe, *supra* note 2, at 298.

19 R. Doak Bishop, Wade M. Coriell & Marcelo Medina Campos, *The 'Null and Void' Provision of the New York Convention*, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 275, 275 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

the framework of Article II(3) has been determined mostly by the case law in the Contracting States and scholarly writings.[20]

2. General Characteristics of the New York Convention and Article II(3)

2.1. Pro-Enforcement Bias

The 1969 Vienna Convention on the Law of Treaties stipulates in its Article 31(1) that "[a] treaty shall be interpreted … in the light of its object and purpose".[21] This provision has a special importance, when the scope of a provision in the international convention is open to different interpretations because the uniform application of the convention would be endangered, if different national jurisdictions construe the provisions in question differently. Due to the abovementioned reasons, Article II(3) of the New York Convention provides limited guidance, in particular as regards the scope and interpretation of the terms "null and void, inoperative or incapable of being performed".[22]

The object and purpose of the New York Convention is the proliferation of arbitration in the settlement of international disputes and "the facilitation of the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements".[23] This statement is explained by the United States Supreme Courts as follows:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[24]

In *Leede v. Ceramiche Ragno*, the United States Court of Appeals for the First Circuit sets forth that "an expansive interpretation of

---

20 *Id.* at 276.

21 Vienna Convention on the Law of Treaties, art. 31, May 23 1969, 8 I.L.M. 679.

22 *See supra* notes 16 and 17.

23 Int'l Council for Com. Arb., *supra* note 5 at 14-15.

24 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (U.S. 1974).

Article II(3) would be antithetical to the goals of the Convention".[25] An expansive interpretation means that the exceptions listed in the provision are construed broadly, which would endanger the validity of many arbitration agreements and thus narrow the application area of arbitration in general. Therefore, when interpreting Article II(3), national courts are expected to favor the recognition and enforcement in accordance with the Convention's object and purpose.[26] As stated in *Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro*, "[t]he policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate".[27] This approach is referred to as "pro-enforcement bias" and prescribes that the exceptions in Article II(3) will be construed narrowly so as to favor the interpretations upholding the validity of arbitration agreements.[28] The basis of the pro-enforcement bias is the presumptive validity of the arbitration agreement, which can be refuted only in the case of exhaustive exceptions listed in Article II(3).[29]

The pro-enforcement bias of domestic courts is mainly based on the modern arbitration statutes adopted by most of the Contracting States, among which 72 jurisdictions implemented the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law")[30], whereas many others also embraced pro-enforcement models.[31] Another important factor favoring the pro-enforcement bias has been the interactive influence between the courts of different Contracting States.[32] Lamm and Sharpe summarize this influence as a "jurisprudential cross-fertilization that spurred courts' internationalist, pro-arbitration approach and a uniform application of the Convention's

---

25 Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. P.R. 1982).

26 Int'l Council for Com. Arb., *supra* note 5 at 15.

27 Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50, 54 (3d Cir. V.I. 1983).

28 Int'l Council for Com. Arb., *supra* note 5 at 15.

29 *Id.* at 37.

30 *See* Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Apr. 24, 2016).

31 Lamm & Sharpe, *supra* note 2, at 297.

32 *Id.* at 297.

terms" and they argue that the influence created by the *Mitsubishi v. Chrysler Plymouth* saga of the United States Supreme Court can be shown as an example of such interaction.[33] Last but not least, the limitation of exceptions in Article II(3) to "internationally recognized defenses" constitutes a reflection of the pro-enforcement bias.[34]

2.2. Mandatory Character

Article II(3) of the New York Convention comprises a mandatory language ("shall"), which does not grant a discretionary power to the courts of the Contracting States on whether to refer the parties to arbitration or not, as long as all requirements under Article II(3) are fulfilled.[35] The mandatory character of the referral to arbitration is accepted as an "internationally uniform rule" that would abrogate any interpretation in the contrary based on domestic law.[36] Neither national legislation nor a private agreement between the parties would be sufficient to supersede or alter Article II(3).[37]

---

33 *Ibid.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (U.S. 1985) sets forth the pre-enforcement bias, that should also be adopted in the interpretation of Article II(3), with the following paragraph: "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. It would damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

34 Bishop, Coriell & Campos, *supra* note 20, at 296.

35 Youseph Farah & Sara Hourani, *Frustrated at the interface between court litigation and arbitration? Don't blame it on Brussels I! Finding reason in the decision of West Tankers, and the recast Brussels I*, *in* Research Handbook on EU Private International Law 116, 139 (Peter Stone & Youseph Farah eds., 2015). Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, *in* 50 Years of the New York Convention: ICCA International Arbitration Conference 649, 653 (Albert Jan van den Berg ed., 2009). Int'l Council for Com. Arb., *supra* note 5 at 38.

36 Albert Jan van den Berg, The New York Convention of 1958: An Overview 10, Arb. ICCA, http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited Apr. 24, 2016).

37 Burke, *supra* note 13, at 6.

2.3. No *Ex Officio* Referral

The expression "at the request of one of the parties" stipulates that courts are not entitled to refer the parties to arbitration on their own initiative.[38] Although there is a valid arbitration agreement, the referral to arbitration will not come into question, unless one of the parties invokes the arbitration agreement.[39] However, there is also an argument that the *lex fori* can constitute the basis of such a referral in absence of a request by the parties and Article II(3) would not preclude the application of the *lex fori* in such a case.[40] This comment seems compatible with the pro-enforcement bias of the Convention and its underlying objective to promote international arbitration.

2.4. Burden of Proof

The party requesting a referral to arbitration must demonstrate that there is a binding arbitration agreement between the parties, as a consequence of the principle that the burden of proof lies with the person making the claim (*actori incumbit probation*).[41] According to the presumption of validity and efficacy of the arbitration agreement[42], after a *prima facie* showing of a valid arbitration agreement, the burden of proof will shift to the other party, who will be required to prove that the arbitration agreement is invalid due to the presence of one of the exceptions listed in Article II(3) ("null and void, inoperative or incapable of being performed").[43]

2.5. Timing of Referral

Article II(3) does not stipulate any time limit as regards the invocation of the arbitration agreement and in absence of such a provision, the issue of timing of referral will be solved by the application

---

38 Abhishek M. Singhvi, *Article II(3) of the New York Convention and the Courts*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 204, 216 (Albert Jan van den Berg ed., 1999).

39 Van den Berg, *supra* note 37, at 10.

40 Schramm, Geisinger & Pinsolle, *supra* note 3, at 103.

41 Lamm & Sharpe, *supra* note 2, at 304.

42 Int'l Council for Com. Arb., *supra* note 5 at 15-16.

43 Schramm, Geisinger & Pinsolle, *supra* note 3, at 102.

of the *lex fori*.[44] On the other hand, in Article 8(1) of the UNCITRAL Model Law, the court's obligation to refer the parties to arbitration in the presence of a valid arbitration agreement is contingent upon the requirement that "a party so requests not later than when submitting his first statement on the substance of the dispute".[45] Along the same line, in most of arbitration laws, the parties are required to invoke the arbitration agreement before any submission on the merits of the dispute, i.e. *in limine litis*, in order to make a valid request for referral.[46] In the event of failure to make a timely request, the parties will be deemed to have waived their right to arbitrate.[47]

The New York Convention does not make any distinction between the requests made before or after the submission of the dispute to arbitration.[48] Therefore, domestic courts will be allowed to render a decision on the validity of the arbitration agreement and the referral to arbitration regardless of whether the arbitral proceedings were initiated or not.[49] However, the referral to arbitration should only be possible before the initiation of or during the arbitral proceedings. If the arbitral tribunal has already issued an award, the court would not refer parties back to arbitration again.[50] In such a case, the question would be whether or not the court will recognize the *res judicata* effect of the arbitral award rather than the validity of the arbitration agreement.

---

44 Van den Berg, *supra* note 37, at 10.

45 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, art. 8(1), UNCITRAL, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Apr. 24, 2016).

46 Van den Berg, *Hypothetical Draft*, *supra* note 36, at 654. Int'l Council for Com. Arb., *supra* note 5 at 41.

47 Int'l Council for Com. Arb., *supra* note 5 at 41.

48 *Ibid*.

49 Antonias Dimolitsa, *Seperability and Kompetenz-Kompetenz*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 217, 244 (Albert Jan van den Berg ed., 1999).

50 Burke, *supra* note 13, at 3-4.

3. General Principles of Arbitration Law and Their Effects on Article II(3)

3.1. Autonomy/Severability Doctrine and Its Effect on the Application of Article II(3)

The doctrine of autonomy and severability of the arbitration agreement has a significant importance in international arbitration. The severability doctrine stipulates that the arbitration agreement or clause is autonomous from the underlying contract. Most arbitration laws and other related national laws accept this doctrine as one of the main principles of arbitration.[51] The UNCITRAL Model Law also includes this principle in Article 16, which sets forth that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" and "a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure the invalidity of the arbitration clause".*[52]

As a consequence of the severability doctrine, the law applicable to the arbitration agreement might be different from the law applicable to the underlying contract[53] and the invalidity of the latter does not necessarily give rise to the invalidity of the arbitration agreement.[54] Although the New York Convention does not contain a specific provision on the severability doctrine, its applicability will never be challenged "due to the doctrine's prevalence in national and transnational law".[55] The importance of this doctrine in the context of Article II(3) is that the invalidity of the main contract by itself will not give rise to the refusal of referral to arbitration by the national court; but the latter will be allowed to refuse referral only in the finding that the autonomous arbitration agreement is invalid.[56] In *Buckeye Check Cashing, Inc. v. Cardegna, the United States Supreme Court explained that the severability doctrine would apply* as a matter of substantive federal

---

51 Schramm, Geisinger & Pinsolle, *supra* note 3, at 51. Van den Berg, *Hypothetical Draft*, *supra* note 36, at 655.

52 UNCITRAL Model Law, *supra* note 46, art. 16.

53 Van den Berg, *Hypothetical Draft*, *supra* note 36, at 655.

54 Schramm, Geisinger & Pinsolle, *supra* note 3, at 52.

55 *Ibid.*

56 Int'l Council for Com. Arb., *supra* note 5 at 52.

arbitration law and concluded that a challenge to the validity of the contract as a whole would not prevent arbitration provisions included in the contract from being enforceable.[57] As it would be more burdensome to prove the invalidity of the arbitration agreement rather than the invalidity of the main contract as a whole, the doctrine of severability and autonomy of the arbitration agreement increases the possibility of referral to arbitration by limiting the scope of the exceptions in Article II(3).[58]

3.2. Standard of Review – Negative Effect of Compétence-Compétence

The standard of review is very important and determinative for the result of the test as to whether the national court will refer the parties to arbitration according to Article II(3). The main distinction as regards the standard of review is between the traditional approach, according to which courts will analyze the validity of the arbitration agreement with a full review of the merits, and the modern approach, which prescribes a *prima facie* review.[59] As the New York Convention does not define a certain standard of review, each court will make this determination according to the *lex fori*. As Graffi rightly emphasizes that "domestic procedural technicalities strongly contribute to undermine the uniform mandate of Article II(3) of the New York Convention"[60]; the application of different standards of review according to the approach adopted by the specific jurisdiction may give rise to different results in similar cases, which would imperil the objective of uniform application of the New York Convention.

Legal commentators agree that courts are allowed to apply a full review, as the New York Convention does not contain an express provision limiting the standard of review.[61] On the other hand, the

---

57 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (U.S. 2006).

58 Bishop, Coriell & Campos, *supra* note 20, at 280.

59 *Ibid*.

60 Graffi, *supra* note 6, at 686.

61 Farah & Hourani, *supra* note 36, at 140. Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II(3) of the New York* Convention, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 323, 323 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

prevailing view is that the courts should abstain from an in-depth inquiry by adopting a *prima facie* review and by laying a heavy burden of proof on the party claiming the invalidity of the arbitration agreement.[62] This view is based on the presumption that a limited scrutiny on the validity of the arbitration agreement favors the pro-enforcement bias of the New York Convention by limiting the refusal of referral to arbitration to the cases where the invalidity is manifest at the referral stage.[63] The main advantages of the *prima facie* review are summarized as "the prevention of the attempts to exploit protracted court proceedings reviewing validity challenges to the arbitration agreements" and "the centralization of litigation concerning the existence and validity of the arbitration agreement before certain specific courts".[64] The adoption of the *prima facie* review and the doctrine of autonomy also reinforce the view supporting a narrow interpretation of the exceptions in Article II(3).[65] Despite the persuasiveness of the aforementioned arguments in favor of the *prima facie* review, there is also a view supporting the full review on the merits. For instance, Dimolitsa argues that the language of the New York Convention "suggests an examination of the arbitration agreement on the merits and even in depth".[66]

The application of the *prima facie* test as standard of review is also closely related to the negative effect of the compétence-compétence principle, which is one of the pillars of international arbitration.[67] Most national legislations explicitly refer to the compétence-compétence principle; in particular the jurisdictions, which implemented the UNCITRAL Model Law, recognize this principle.[68] The principle of compétence-compétence is described as a dual-functioned principle and these functions are referred to as its "positive" and "negative" effects.[69] The positive effect stands for the authority of the arbitral tribunal to decide on its own jurisdiction; whereas the negative effect

---

62 Van den Berg, *Hypothetical Draft*, *supra* note 36, at 694. Kröll, *supra* note 62, at 323.

63 *See supra* note 30.

64 Bishop, Coriell & Campos, *supra* note 20, at 283.

65 *Id.*, at 286.

66 Dimolitsa, *supra* note 50, at 244.

67 Van den Berg, *Hypothetical Draft*, *supra* note 36, at 694.

68 Graffi, *supra* note 6, at 681-682.

69 Schramm, Geisinger & Pinsolle, *supra* note 3, at 95.

serves to the limitation of the courts' interference on the scrutiny of the arbitral tribunal's jurisdiction.[70] According to this negative effect, the courts would be authorized for the full review of an arbitral tribunal's jurisdiction only in the recognition and enforcement stage of an arbitral award or in setting aside proceedings; whereas a *prima facie* test would be applied at the referral stage, as a result of which arbitration agreements would be construed as invalid only in manifest cases.[71] Besides favoring the narrow interpretation of the exceptions in Article II(3), a strict application of the negative effect of compétence-compétence and the *prima facie* review would also serve to "prevent the preemptive early court fights over arbitral jurisdiction [that] are largely unnecessary and expensive dead weight, often significantly reducing the effectiveness and increasing the cost of the arbitral process".[72]

The New York Convention neither sets a standard of review nor expressly imposes the compétence-compétence principle. Therefore, the approaches adopted by each national jurisdiction will be decisive on these interrelated issues. The widest application of the negative effect of the compétence-compétence principle and the strictest application of the *prima facie* review seems to be accepted by the French law, which stipulates in Article 1448 of the French Code of Civil Procedure that "courts must decline jurisdiction unless the arbitral tribunal has not been constituted and if the arbitration agreement is *manifestly* null and void or inapplicable".[73] According to this formulation, national courts cannot confer jurisdiction, if there is already a constituted arbitral tribunal and even in the case that the tribunal has not been constituted; the invalidity of the arbitration agreement must be *manifest*, i.e. ascertainable with a *prima facie* review, so that the court can confer jurisdiction and refuse a referral to arbitration.[74] The French

---

70 Graves, *supra* note 4, at 2. Schramm, Geisinger & Pinsolle, *supra* note 3, at 95.

71 Int'l Council for Com. Arb., *supra* note 5 at 40.

72 Graves, *supra* note 4, at 3.

73 Code de procédure civile, art. 1448: "Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est *MANIFESTEMENT* nulle ou manifestement inapplicable." (emphasis added), Légifrance, https://www.legifrance.gouv.fr/telecharger_pdf.do?cidTexte=LEGITEXT000006070716 (last visited Apr. 24, 2016).

74 Schramm, Geisinger & Pinsolle, *supra* note 3, at 96-97.

law extends the scope of the compétence-compétence principle to such a degree that the consistency of Article 1448 of the French Code of Civil Procedure with Article II(3) of the New York Convention is brought into question.[75] According to Burke, the French law diverges from "the plain and ordinary meaning of the New York Convention" because the French law, as opposed to the New York Convention, does not allow national courts to perform an inquiry of referral to arbitration in the cases where the arbitral tribunal has already been seized of the arbitration and the scope of exceptions as formulated by the French law ("*manifestly* null and void an unenforceable") is much narrower than the scope defined in Article II(3) ("null and void, inoperative or incapable of being performed").[76] The question is whether it should be allowed that the national legislature of a Contracting State sets such a different standard than the New York Convention.[77] The answer would definitely be in the negative, if the national law made the enforcement of arbitration agreements or arbitral awards more difficult than foreseen by the Convention. However, the answer is just the contrary according to the opinion that the national legislature is always allowed to set more lenient standards than the Convention.[78] Such a distinction is based on the pro-enforcement bias of the Convention, which provides that less favorable legislation would be abrogated by the New York Convention.[79]

The interpretation of the compétence-compétence principle and the determination of the standard of review varies according to the jurisdiction. While the French law, as stated above adopts an even more liberal approach than the New York Convention, many jurisdictions stick to the traditional approach, by adopting a full review on the validity and enforcement of the arbitration agreement at the referral stage. For instance, the Austrian Supreme Court is shown as one of

---

75 Burke, *supra* note 13, at 7.

76 *Ibid*.

77 *Ibid*.

78 Loukas A. Mistelis, *Arbitrability – International and Comparative* Perspectives, *in* Arbitrability: International and Comparative Perspectives 1, 1 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

79 Int'l Council for Com. Arb., *supra* note 5 at 37.

the high courts, which favor the traditional approach.[80] The Swedish Arbitration Act also sets an example of the traditional approach, by providing national courts with a broad range of review of the arbitral tribunal's jurisdiction.[81] Before the adoption of the Arbitration Act of 1996, it was even claimed that the principle of compétence-compétence was not part of the English law and thus domestic courts had wider discretion when resolving disputes concerning the jurisdiction of arbitral tribunals.[82] Article 1032 of the German Code of Civil Procedure is substantially very similar to Article II(3) of the New York Convention because it contains the same list of exceptions and it neither defines the scope of these exceptions nor specifies the standard of review.[83] Therefore, the case law is determinative and German courts have adopted an interpretation in favor of the full review at the referral stage, since they are "reluctant to recognize the negative effect of the compétence-compétence principle", as opposed to the French law.[84]

On the other hand, most national jurisdictions accept the *prima facie* review of the validity of the arbitration agreement at the referral

---

80 Bishop, Coriell & Campos, *supra* note 20, at 281. This view is based on the formulation of the Austrian Supreme Court (Oberster Gerichtshof, Oct. 2, 1935, SZ17/131), which -as opposed to the French courts- stated that "it would entail duplication of effort if a party contesting the jurisdiction pf an arbitral tribunal were obliged to pursue the proceedings before that tribunal before being able to bring a court action to annul the arbitral proceedings".

81 In Section 2 of the Swedish Arbitration Act (SFS 1999:116), it is stated that the positive effect of the competence-competence principle shall not prevent a court from deciding on the jurisdiction of an arbitral tribunal and that a decision of the arbitral tribunal conferring jurisdiction is not binding for the national court.

82 Emmanuel Gaillard, *Efforts by a Party to Seek Intervention by a National Court for the Purpose of Delaying or Disrupting the Arbitration: Laws and Court Decisions in Civil Law Countries*, *in* Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases 162, 167 (Albert Jan van den Berg ed., 1991), Kluwer Arb., http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn27672#footnote-ref-a0022 (last visited Apr. 24, 2016).

83 Zivilprozessordnung, **§ 1032, para. 1: "**Wird vor einem Gericht Klage in einer Angelegenheit erhoben, die Gegenstand einer Schiedsvereinbarung ist, so hat das Gericht die Klage als unzulässig abzuweisen, sofern der Beklagte dies vor Beginn der mündlichen Verhandlung zur Hauptsache rügt, es sei denn, das Gericht stellt fest, dass die Schiedsvereinbarung *nichtig, unwirksam oder undurchführbar* ist." (emphasis added), Juris GmbH, https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf (last visited Apr. 24, 2016).

84 Schramm, Geisinger & Pinsolle, *supra* note 3, at 99.

stage. The language of the UNCITRAL Model Law is also interpreted as in favor of the modern approach.[85] The Swiss Federal Supreme Court clearly stated that the test of validity of the arbitration agreement should be based on a *prima facie* review.[86] In the same vein, the Indian Supreme Court firstly emphasized that the preponderance of liberal approach in different legal systems and then rightly decided that the court should confine itself to a *prima facie* review, as the arbitrator would in any case be entitled to have a full review of the issue and render its decision accordingly.[87] Similarly, in *Riley v. Kingsley Underwriting Agencies*, the United States Court of Appeals for the Tenth Circuit truly decided that there must be a limited inquiry at the pre-reference stage, since it is always possible to consider the grounds for refusal of enforcement at the post-award stage.[88]

4. Conflict of Laws Aspect in Interpretation of Artcile II(3) - Applicable Law

Article II(3) of the New York Convention does not include a definition of the terms "null and void, inoperative or incapable of being performed" and the scope of these terms are to be determined under the law applicable to the validity of the arbitration agreement.[89]

---

85 Emmanuel Gaillard, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y. L. Rev., Dec. 1, 2005, at 7, Shearman, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/12/Prima-Facie-Review-of-Existence-Validity-of-Arb2__/Files/IA_NYLJ-Prima-Facie_040308_14/FileAttachment/IA_NYLJ-Prima-Facie_040308_14.pdf (last visited Apr. 24, 2016).

86 Bundesgericht April 29, 1996, 122 Entscheidungen der Schweizerischen Bundesgerichts III 139, S. 143: "La convention d'arbitrage litigieuse a toutes les apparences de la validité, sans que se manifestent, avec une certaine évidence pouvant ressortir d'un examen prima facie, des éléments permettant de la qualifier de caduque, d'inopérante ou d'inapplicable.", Bger, http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=atf%3A%2F%2F122-III-139%3Ade (last visited Apr. 24, 2016).

87 Supreme Court of India, Aug. 12, 2005, Shin-Etsu Chemical Co. Ltd vs M/S. Aksh Optifibre Ltd. & Anr: "The liberal approach which seems to be gaining increasing popularity in many legal systems both statutorily as well as through judicial interpretation is to restrict the review of validity of arbitration agreement at a prima facie level. For final review the parties may raise issue before arbitral forum or post award.", Indian Kanoon, https://indiankanoon.org/doc/847271/ (last visited Apr. 24, 2016).

88 Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. Colo. 1992).

89 Graves, *supra* note 4, at 4.

However, Article II(3) is also silent on this issue[90], as it does not determine the applicable law, when the validity of an arbitration agreement is challenged at the referral stage.[91] The reason of the lack of an express provision on the law governing the arbitration agreement is demonstrated as the fact that Article II was added by the drafters to the Convention "in the last minute".[92]

When determining the applicable law to define the scope of the exceptions in Article II(3), there are three main standards: (1) the conflict-of-laws approach based on national law standard, (2) the uniform international standard and (3) the maximum standard based on internationally neutral defenses.[93] According to the national law standard, the conflict-of-laws rules will determine the law applicable to Article II(3); whereas the uniform international standard does not require any conflict-of-laws analysis and is based on the view that the validity of an arbitration agreement must rely on international standards rather than any national law, since international arbitration belongs to a transnational legal order rather than any national legal order.[94] The "maximum standard" approach can be summarized as a conflict-of-laws approach reinforced by international standards; in other words, it is a compromise of the conflict-of-laws approach and the uniform international standard approach.

The traditional conflict-of-laws approach is based on the application of a national law with its standards concerning the validity of the arbitration agreement.[95] As a result, Article II(3) will be interpreted according to the national law governing the arbitration agreement, which will be determined according to conflict-of-laws rules. In the English case of *Bakwin and Erie Int'l. Trading v. Sothebys*, the claim of the plaintiff was based on the argument that the arbitration agreement, allegedly concluded under threats against property, was

---

90 Silberman, *supra* note 112, at 41.

91 Van den Berg, *Hypothetical Draft*, *supra* note 36, at 654. Graffi, *supra* note 6, at 696.

92 Lamm & Sharpe, *supra* note 2, at 301.

93 Bishop, Coriell & Campos, *supra* note 20, at 286.

94 Di Pietro, *supra* note 14, at 92. Schramm, Geisinger & Pinsolle, *supra* note 3, at 46.

95 Bishop, Coriell & Campos, *supra* note 20, at 287.

null and void.[96] The court firstly found that the choice-of-law clause in the contract gave rise to the application of Swiss law as to whether the arbitration agreement was null and void, and conducted its analysis according to the standards of duress under Swiss law. The court referred to the provisions in the Swiss Code of Obligations to define the scope of duress[97] and after a detailed analysis under Swiss law, found that the arbitration agreement was null and void due to material duress. This approach is criticized because of the view that different standards under different national laws would prevent a uniform application of the New York Convention.

The uniform international standard, which is also referred to as "transnationalist approach"[98], is presented as another aspect of the severability doctrine, which gives rise to the consequence that the choice-of-law clauses in the main contract cannot govern the issue of the validity of the arbitration agreement.[99] The advocates of the transnationalist approach argue that the uniform application of the Convention can only be maintained through the adoption of international standards governing the arbitration agreement. The French courts follow the transnational approach, which is crystallized in the decision of *Société Gatoil v. National Iranian Oil Co.*: "[T]he validity of the agreement must be judged solely in the light of the requirement of international public policy."[100] The criticism directed against this approach is focused on the difficulty to define the international standards governing the arbitration agreement and therefore, the critics support the view that the validity of the arbitration agreement can only be analyzed under specific domestic legal rules.[101] Even if there is a claim based on an internationally recognized defense, such as the duress defense in the abovementioned *Bakewin* case, the uniform international standard would not be sufficient to determine which

---

96 Bakewin and Erie Int'l. Trading v. Sothebys EWHC (QB) [2005] ArbLR 6, Oxford J., http://alrr.oxfordjournals.org/content/2005/1/83.full.pdf (last visited Apr. 24, 2016).

97 *Id.*, para. 33-34.

98 Schramm, Geisinger & Pinsolle, *supra* note 3, at 45.

99 Bishop, Coriell & Campos, *supra* note 20, at 288.

100 *Id.*, at 289.

101 Di Pietro, *supra* note 14, at 92. Bishop, Coriell & Campos, *supra* note 20, at 290.

specific set of rules will be applied to such a defense, since technical requirements for a defense and burden of proof would demonstrate a variety in different legal systems.[102] Due to the lack of an "autonomous discipline" imposed by the New York Convention[103], the analysis as to whether the validity or efficacy of an arbitration agreement is affected by one of the exceptions in Article II(3) should be conducted under a specific national law.[104] Besides that, in practice it would be unrealistic to expect national judges to be aware of already existing internationally recognized rules, as in most cases they would have a tendency to apply the domestic interpretations of their jurisdiction.[105]

The third approach, which is referred to as "the maximum standard" or "the modified conflict-of-laws approach"[106], can be construed as a compromise between the national law standard and the uniform international standard. On the one hand, it applies the conflict-of-laws rules to determine the applicable national law, as the traditional approach does; on the other hand, it only applies the internationally neutral defenses and precludes the parochial national defenses, in order to maintain the uniform application of the Convention.[107] The most important examples to the internationally neutral defenses, which render the arbitration agreement invalid under Article II(3), would be misrepresentation, fraud, the incapacity to agree, duress and undue influence.[108] This compromise seems to offer the most practical solution, as it successfully eliminates the critics directed against both approaches. The US courts, which follow this approach, have adopted a uniform interpretation of the exceptions under Article II(3) by deciding that the arbitration agreement is invalid only in the presence

---

102 Bishop, Coriell & Campos, *supra* note 20, at 290.

103 Lamm & Sharpe, *supra* note 2, at 301.

104 Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 123 (1981).

105 Graffi, *supra* note 6, at 686.

106 Bishop, Coriell & Campos, *supra* note 20, at 288.

107 Int'l Council for Com. Arb., *supra* note 5 at 65. Bishop, Coriell & Campos, *supra* note 20, at 291. Int'l Council for Com. Arb., *supra* note 5 at 65.

108 Bishop, Coriell & Campos, *supra* note 20, at 291. Schramm, Geisinger & Pinsolle, *supra* note 3, at 104.

of internationally neutral defenses.[109] In *Ledee v. Ceramiche Ragno*, the United States Court of Appeals for the First Circuit sets forth the reasoning of the adoption of the "maximum standard" approach, as follows:

> The parochial interests of the Commonwealth, or of any state, cannot be the measure of how the "null and void" clause is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation. Rather, the clause must be interpreted to encompass only those situations -- such as fraud, mistake, duress, and waiver -- that can be applied neutrally on an international scale.[110]

Even after having determined the standard, national courts still have a wide margin of discretion while determining the applicable law, in the absence of a conflict-of-laws rule in Article II(3). Therefore, it is not a big surprise that different jurisdictions have adopted contrary approaches, when they are seized with a request to refer the parties to arbitration. In the United States, the tendency of the courts has been to apply the forum law in the analysis concerning the validity of arbitration agreements.[111] In *Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni v. Lauro*, the United States District Court for the District of the Virgin Islands stated that the New York Convention does not contain a choice-of-law clause governing the validity of the arbitration agreement and then decided that this analysis should be performed in the light of the law of the forum (*lex fori*):

> Article II of the Convention does not indicate which law is to govern enforceability of an arbitral agreement, but its intended purpose is to impose on the ratifying states a "broad undertaking" to give effect to such an agreement unless it offends the law or public policy of a forum. Applying

---

109 Schramm, Geisinger & Pinsolle, *supra* note 3, at 104.

110 Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. P.R. 1982)

111 Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38.25 Ga. J. Int'l & Comp. L. 25, 42 (2009), Digital Commons at U. of Ga. L., http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1108&context=gjicl (last visited Apr. 24, 2016).

> federal law is consistent with the view that enforceability of an agreement to arbitrate relates to the law of remedies and is therefore governed by the law of the forum.[112]

On the other hand, an Italian court of first instance held that the validity issue should be resolved by the law governing the enforceability of the arbitration agreement under the principle of party autonomy and if the parties did not make a choice-of-law as regards the arbitration agreement, the applicable law would be the law of the place of arbitration (*lex loci arbitri*).[113]

These decisions demonstrate the two main lines adopted by national courts, which either directly apply the *lex fori* or refer by analogy to Article V(1)(a) of the New York Convention, which is the provision regulating the applicable law to the validity of the arbitration agreement at the post-award stage, i.e. at the stage of the recognition and enforcement of the arbitral award. The mentioned provision provides that "the recognition and enforcement of the arbitral award may be refused, if the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".[114] As Article V(1)(a) regulates the post-award stage, it does not help the judges to determine the applicable law at the referral stage, if the parties have not included a choice-of-law clause.[115] Despite that, the advocates of the application of Article V(1)(a) by analogy argue that the latter provision is relevant in both the referral stage and the post-award (enforcement) stage.[116] The courts favoring this approach construed

---

112 Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni v. Lauro, 555 F. Supp. 481, 482 (D.V.I. 1982)

113 Singhvi, *supra* note 39, at 215.

114 New York Convention, *supra* note 1, art. V(1)(a).

115 Leonardo D. Graffi, *The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View*, *in* Conflict of Laws in International arbitration 19, 55 (Franco Ferrari & Stefan Kröll eds., 2011).

116 Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 197, 200 (Albert Jan van den Berg ed., 1999). Van den Berg, Towards a Uniform Judicial Interpretation, *SUPRA* note 105, at 126-127.

"the country where the award was made" as "the country where the award will be made" at the referral stage.[117]

If Article V(1)(a) is applied by analogy to Article II(3), it must be determined whether the parties agreed upon the law governing the arbitration agreement. In the absence of a choice-of-law by the parties, the application of the *lex loci arbitri* will come into question. In this case, the controversial issue would be whether the reference is made to the substantive law of the place of arbitration or its choice-of-law rules.[118] The importance of this distinction can be demonstrated through the Swiss law, according to which the Swiss Code of Obligations will be applied, if the reference is made to the substantive law; whereas Article 178(2) of the Swiss Private International Law will come into play, if the *lex loci arbitri* is construed more broadly as including its choice-of-law rules.[119] The Swiss Supreme Court decided that the reference is made to the substantive law determined by the choice-of-law rules in Article V(1)(a):

> [T]he conflict rules in Art. V(1)(a) of the New York Convention must be applied, in order to determine the applicable material law, rather than the conflict rules which would be otherwise applicable in the 'referral State'. This would apply also to the scope of the arbitral clause, which is at issue here.[120]

Haas supports the analogy to Article V(1)(a) with the following statement: "A decision on the validity of an arbitration agreement upon a motion to compel arbitration cannot be different for reasons of internal consistency from the same in the enforcement stage."[121] The courts, which adopted this approach, relied on the advantage of the application of Article V(1)(a) by analogy in the sense that it would

---

117 Dimolitsa, *supra* note 50, at 242. Van den Berg, *supra* note 37, at 11. Lamm & Sharpe, *supra* note 2, at 303.

118 Schramm, Geisinger & Pinsolle, *supra* note 3, at 55.

119 *Ibid*.

120 Tribunal Fédéral, Mar. 21, 1995, Insurance Co. v. Reinsurance Co. (Excerpt), *in* Yearbook Commercial Arbitration, Volume 22 (Albert Jan van den Berg ed., 1997) 800, 804, Kluwer Arb., http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn6459#footnote-ref-a0037 (last visited Apr. 24, 2016).

121 Bishop, Coriell & Campos, *supra* note 20, at 289.

avoid the possibility that an arbitration agreement deemed as valid at the referral stage gives rise to the setting aside of the arbitral award due to any incompliance with the requirements of the chosen law by the parties or the *lex loci arbitri*.[122] On the other hand, Graffi points out that "it is (…) a daunting task to apply the law of the place where the award 'was' made if the parties are disputing over the enforcement and validity of the arbitration agreement".[123] In the same vein, Ferrari and Silberman state that Article V(1)(a) does not have any spillover effect, as it solely concerns the enforcement stage, which constitute a totally different setting from the pre-award stage.[124] Haight, who is one of the drafters of the New York Convention, also stated that the inclusion of the choice-of-law rule in Article V(1)(a) into Article II was intentionally rejected in order to avoid an obligation of the forum to enforce the arbitration agreement, although the latter "offends the law or public policy of the forum".[125] When the plain language and the legislative history of the Convention are taken into consideration, it does not seem coherent to apply the conflict-of-laws rules in Article V(1)(a) by analogy to Article II(3).

In a jurisdiction, which has adopted the application of Article V(1)(a) by analogy, problems would arise in the cases where the parties have not chosen the law governing the arbitration agreement and the place of arbitration is not clear, since the agreement does not refer to a seat of arbitration and the arbitral tribunal has not yet been constituted. In such cases, the court may be inclined to apply the *lex fori*[126] or the *lex contracti*[127]. Although the application of the *lex fori* may lead to forum-shopping or "litigation maneuvering by the respective parties"[128], the latter would not constitute a problem

---

122 Silberman, *supra* note 112, at 42-43.

123 Graffi, *The Law Applicable*, *supra* note 116, at 55.

124 Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, *in* Conflict of Laws in International arbitration 257, 267 (Franco Ferrari & Stefan Kröll eds., 2011).

125 G. W. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference 27-28 (1958).

126 Lamm & Sharpe, *supra* note 2, at 303.

127 Schramm, Geisinger & Pinsolle, *supra* note 3, at 56.

128 Silberman, *supra* note 112, at 42.

concerning the uniform application of the Convention, as long as the national courts follow the maximum standard approach, by accepting only the internationally recognized defenses.[129] Due to the severability principle, the law governing the contract would not apply *per se* to the arbitration agreement; however, most courts have interpreted that the determination of *lex contracti* should be accepted as an implicit choice-of-law as regards the arbitration agreement.[130] In practice, the parties would generally include a choice-of-law clause with the intent that the latter also governs the issues concerning the arbitration agreement and the determination of a specific law applicable to the arbitration agreement would only be found in very complex transactions.[131] Therefore, the severability doctrine should not be construed to the detriment of party autonomy and the choice-of-law governing the contract should also apply to the arbitration agreement.

5. The Scope of the Exceptions in Article II(3)

Article II(3) does not provide with any definition of the terms "null and void, inoperative or incapable of being performed" and therefore, there is a lack of clarity as regards the scope of the article. The precise meaning of the exceptions under Article II(3) is not required; however, it is essential to define their scope to determine which cases are classified under these exceptions.[132]

There are three different exceptions and each of them refers to a separate category of invalidity or inefficacy; however, as all of them will lead to the same result, which is the refusal of referral to arbitration, in practice there will not be any need to distinguish them with strict lines. In any event, it is inevitable that certain grounds for invalidity fall under the scope of different exceptions at the same time, which gives rise to an overlap of the terms.[133] It is more of an academic and

---

129 Lamm & Sharpe, *supra* note 2, at 303.

130 Schramm, Geisinger & Pinsolle, *supra* note 3, at 54-55.

131 Graffi, *The Law Applicable*, *supra* note 116, at 30.

132 Born, *supra* note 18, at 160.

133 Schramm, Geisinger & Pinsolle, *supra* note 3, at 102.

pedagogic distinction rather than a practical one, since the courts evaluate the exceptions under Article II(3) as a whole.[134]

On the other hand, in some cases there might be significant differences between the exceptions under Article II(3), which render a categorization more important than in other cases. For instance, the "incapable of being performed" provision is different than the other exceptions in the sense that in principle the arbitration agreement is valid but it cannot be performed due to some reasons in the given case; whereas in the other two exceptions, the arbitration agreement is either invalid right at the outset ("null and void" provision)[135] or the intrinsically valid arbitration agreement became ineffective at some point after its conclusion ("inoperative" provision).[136] As a result, an arbitration agreement, which is "incapable of being performed", can become effective again, if the situation causing its inability to be performed is enhanced in the future.[137] This feature of curability is especially important, if the arbitration agreement is related to an ongoing relationship, such as a framework agreement, rather than a one-off agreement.[138]

Apart from the definitions of different terms, it is also important to determine how broadly or narrowly the scope of Article II(3) will be interpreted. Taking into consideration the pro-enforcement bias of the Convention, it would make more sense to favor a narrow interpretation.[139] In *Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro*, this approach is clearly stated: "The 'null and void' language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate."[140]

---

134 Born, *supra* note 18, at 160. Schramm, Geisinger & Pinsolle, *supra* note 3, at 103.

135 *See supra* note 119.

136 Kröll, *supra* note 62, at 328.

137 *Ibid.*

138 *Id.*, at 329.

139 Dimolitsa, *supra* note 50, at 243. Kröll, *supra* note 62, at 353.

140 Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50, 51 (3d Cir. V.I. 1983).

5.1. The Concept of "Null and Void"

Null and void arbitration agreements are defined as "intrinsically defective", which means that they are considered as invalid right from the beginning.[141] The analysis to determine whether an arbitration agreement is "null and void" focuses on the validity of the parties' consent to arbitrate. If the consent is vitiated, the arbitration agreement will be affected by invalidity at the outset under the "null and void" provision.[142] The typical examples which fall under this category are listed as "the lack of consent due to misrepresentation, fraud, incapacity to agree, duress and undue influence".[143] This is a non-exhaustive list, which originates from the case law and the views of legal commentators, since the New York Convention does not provide with any examples.

Misrepresentation and fraud are defined as "intentional material misstatement or coercion" committed by one of the parties in order to convince the other party to conclude an arbitration agreement.[144] The most important element of this definition is the wrongful intention of the party inducing the counterparty of the agreement. Therefore, if the delusion is based on the wrong information or lack of knowledge of the misleading party rather than its intentional manipulation, it is not possible to define such a delusion under the category of misrepresentation and fraud. Another fundamental element of fraud is the casual link between the alleged fraud and the conclusion of the arbitration agreement.[145] As a result of the severability doctrine, this casual link must exist particularly with the arbitration agreement rather than with the main contract as a whole.

The incapacity to agree is defined as an impediment of a party to enter into a binding arbitration agreement as a matter of law[146] and is a defense that is also analyzed in relation to the "subjective" arbitrability issue. As opposed to the "objective" (*ratione materiae) arbitrability which*

---

141 Van den Berg, *supra* note 37, at 11. Lamm & Sharpe, *supra* note 2, at 300.

142 Bishop, Coriell & Campos, *supra* note 20, at 276.

143 Born, *supra* note 18, at 160. Van den Berg, *supra* note 37, at 11. Int'l Council for Com. Arb., *supra* note 5 at 52.

144 Bishop, Coriell & Campos, *supra* note 20, at 293.

145 Bishop, Coriell & Campos, *supra* note 20, at 294.

146 *Ibid*.

concerns the arbitrability of the dispute and is unrelated with the quality of the parties, the "subjective" (ratione personae) arbitrability requires that the parties of the arbitration agreement have the authority to submit the dispute to arbitration.[147] The incapacity is also addressed in Article V(1)(a) as a ground for refusal of the recognition and enforcement of arbitral awards, where it is provided that the test of capacity will be performed according to the law "applicable to the parties"[148], which will be determined "under the conflict-of-laws rules of the forum".[149] In most cases, the law applicable to a party will be the national law of that party and thus, it will be examined whether the party has the authority to enter into the arbitration agreement according to its national law. Although the incapacity defense includes cases where minors of a certain age or incapacitated persons are not allowed to enter into an arbitration agreement, in practice this defense mostly comes into play in investor-state disputes.[150] For instance in ICSID cases, a state may claim that a certain legal entity or person representing that state was not capable of entering into an arbitration agreement and thus, the latter cannot be binding upon the state.[151] In the ICSID case of *SPP v. Egypt, the respondent State claimed that certain acts of Egyptian officials were null and void due to their incompliance with the Egyptian law; however this claim was rejected by the tribunal because "these acts were cloaked with the mantle of governmental authority and communicated as such to foreign investors who relied on them in making their investments"*.[152]

Defense of duress, which is another categorization under the "null and void" provision refers to cases where one of the parties induced the other party to enter into the arbitration agreement by coercion.[153] Although the elements of duress may vary according to the jurisdiction,

147 Di Pietro, *supra* note 14, at 90.

148 New York Convention, *supra* note 1, art. V(1)(a).

149 Schramm, Geisinger & Pinsolle, *supra* note 3, at 56-57.

150 Bishop, Coriell & Campos, *supra* note 20, at 294.

151 *Ibid*.

152 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. Arb/84/3, Award, World Bank Group, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC671_En&caseId=C135 (last visited Apr. 24, 2016).

153 Bishop, Coriell & Campos, *supra* note 20, at 294.

the most common four elements which are listed in *Bakwin* case, where the court conducted an analysis of duress under the Swiss law, are as follows: "(i) there must be a 'threat', (ii) the threat must be unlawful, (iii) the threat must result in actual and justified fear, and (iv) there must be a causal link between the threat and the consent given to enter into the contract".[154]

The defense of undue influence, which is described as "[the] influence or dominion(…), which destroys the free agency of the testator, and substitutes in the place thereof the will of another"[155], also consists of four elements, which are listed by the United States courts as follows: "(i) a person who is susceptible to influence, (ii) another person who had the opportunity to exert undue influence, (iii) the exertion of improper influence, and (iv) the production of the desired effect as a result of the influence".[156] In the context of the "null and void" provision in Article II(3), the desired effect in the last element would be that the party susceptible to influence enters into an arbitration agreement.

There may also be doubts as regards the intent of the parties, where the arbitration agreement is a poorly drafted one, which is vague, indefinite, incomplete, unclear or include internal contradictions.[157] Such arbitration agreements are referred to as "pathological clauses". Although there are legal commentators, who analyze "pathological clauses" under the "inoperative"[158] and "incapable of being performed"[159] provisions, it would be more suitable to categorize them under the "null and void" provision, since if these agreements are incurably defected, they will be considered as invalid at the outset and and thus, there will not be any possibility that they have an effect on the parties in

---

154 Bakewin and Erie Int'l. Trading v. Sothebys, *supra* note 97.

155 Lyle v. Bentley, 406 F.2d 325, 328 (5th Cir. Tex. 1969).

156 Bishop, Coriell & Campos, *supra* note 20, at 295.

157 Van den Berg, *supra* note 37, at 11. Article II (B) (Schramm, Geisinger, Pinsolle): 58. Int'l Council for Com. Arb., *supra* note 5 at 53.

158 Schramm, Geisinger & Pinsolle, *supra* note 3, at 50-51. Lamm & Sharpe, *supra* note 2, at 307.

159 Van den Berg, *supra* note 37, at 11.

the future.[160] Some examples which are examined under this category involve the cases where the parties determined litigation and arbitration as alternatives to each other instead of exclusively referring to arbitration[161], they did not use a mandatory language in the arbitration clause and decided that the dispute "may" or "can" be resolved through arbitration[162], they referred to an arbitral institution that does not exist in the given seat of arbitration[163] or they alternatively referred to two different arbitral institutions in the same agreement. In such cases, most jurisdictions adopt a liberal approach and interpret the arbitration agreement broadly to give the intent of the parties the maximum legal effect.[164] Therefore, the invalidity of these arbitration agreements will come into question, when they cannot be given any meaning and thus, the intent of the parties cannot be clearly set forth.[165] This approach is also in reliance with the pro-enforcement bias of the Convention.

5.2. The Concept of "Inoperative"

Inoperative arbitration agreements are considered to have ceased their effect by the time of the request to refer parties to arbitration, although they were valid at the outset.[166] Therefore, an inoperative arbitration agreement is inapplicable to the parties and the dispute in question at the referral stage.[167] The typical cases that render an arbitration agreement inoperative are waiver, novation, revocation, repudiation or termination of the arbitration agreement[168]. Although novation of the contract can render the arbitration agreement

---

160 Kröll, *supra* note 62, at 332-333. Article II (B) (Schramm, Geisinger, Pinsolle): 50-51. Int'l Council for Com. Arb., *supra* note 5 at 53.

161 Van den Berg, *supra* note 37, at 11. Lamm & Sharpe, *supra* note 2, at 307.

162 Int'l Council for Com. Arb., *supra* note 5 at 53.

163 Lamm & Sharpe, *supra* note 2, at 310. Schramm, Geisinger & Pinsolle, *supra* note 3, at 60.

164 Int'l Council for Com. Arb., *supra* note 5 at 53. Schramm, Geisinger & Pinsolle, *supra* note 3, at 58-59.

165 Schramm, Geisinger & Pinsolle, *supra* note 3, at 59-60. Lamm & Sharpe, *supra* note 2, at 313.

166 Born, *supra* note 18, at 160. Article II (B) (Schramm, Geisinger, Pinsolle): 105-106. Int'l Council for Com. Arb., *supra* note 5 at 52.

167 Lamm & Sharpe, *supra* note 2, at 300-301.

168 Born, *supra* note 18, at 160. Van den Berg, *supra* note 37, at 11. Int'l Council for Com. Arb., *supra* note 5, at 52-53.

inoperative, it will not always be the case due to the autonomous character of the arbitration agreement.[169]

Besides that, if the arbitration agreement includes any time limit for the initiation of the arbitration proceedings or for the final award, it will cease to have effect with the expiration of this limit, since the parties' intent to be bound by the arbitration agreement only pertains to the mentioned time frame.[170]

The right to arbitrate is a contractual right that can always be waived but the burden of proof is upon the party who claims that the other party waived its right to arbitrate.[171] Waiving the contractual right to arbitrate may appear in different ways, such as acquiescence to litigation, improper invocation of the arbitration agreement, prosecution of related claims in court and modification of the arbitration agreement.[172]

5.3. The Concept of "Incapable of Being Performed"

An arbitration agreement is considered as "incapable of being performed" in the cases where "the arbitral process cannot be effectively set into motion" because of a physical or legal impediment.[173] The reason that render the arbitration agreement "incapable of being performed" may be the impossibility to reach the purpose of the arbitration agreement in the given circumstances or the fact that its purpose already has been attained.[174] The physical impediments that prevent the arbitration from proceeding may include cases where the arbitrator named in the agreement is not able to perform his/her duties[175], actions of either party at the referral stage[176], the obstacles to

---

169 Lamm & Sharpe, *supra* note 2, at 317.

170 Schramm, Geisinger & Pinsolle, *supra* note 3, at 106.

171 *Ibid.*

172 Lamm & Sharpe, *supra* note 2, at 314.

173 Lamm & Sharpe, *supra* note 2, at 300. Van den Berg, *supra* note 37, at 11. Schramm, Geisinger & Pinsolle, *supra* note 3, at 108. Int'l Council for Com. Arb., *supra* note 5 at 53.

174 Kröll, *supra* note 62, at 325.

175 Int'l Council for Com. Arb., *supra* note 5 at 53. Born, *supra* note 18, at 160.

176 Born, *supra* note 18, at 160.

the constitution of the arbitral tribunal[177], political circumstances at the seat of arbitration[178] and inaccessibility of the seat of arbitration[179]. On the other hand, the legal impediments include cases of supervening domestic law[180] and non-arbitrability of the dispute in question at the seat of arbitration[181]. These lists are not exhaustive and there are also grey areas of the "incapable of being performed" provision, where there are controversial views in different jurisdictions, such as the impecuniosity of one of the parties.

There may be various reasons that cause the inability of the arbitrator to perform his/her duties. The death of the named arbitrator or the arbitrator's refusal of appointment can cause the unenforceability of an arbitration agreement, if there is no possible mechanism to replace that arbitrator under the procedural rules governing the arbitration.[182]

Another issue concerning the constitution of the arbitral tribunal, which has the potential to render the arbitration agreement "incapable of being performed", is the refusal of one of the parties to take the required steps for the appointment of the arbitrator.[183] When the arbitration agreement requires both parties' cooperation for the appointment procedure, the arbitration agreement encounters the risk of being considered "incapable of being performed", if the arbitral tribunal cannot be constituted due to one of the parties' acts.[184] However, in such cases, most courts upheld the arbitration agreement, by applying fall back provisions in national laws that allow alternative

---

177 Schramm, Geisinger & Pinsolle, *supra* note 3, at 108.

178 Kröll, *supra* note 62, at 340.

179 Born, *supra* note 18, at 160.

180 Born, *supra* note 18, at 160. An example given to the superseding domestic law is the Indian case of *Indian Organic Chemicals Ltd. … vs Chemtex Fibres Inc. And Ors*, where the Bombay High Court decided that "[the] restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the India firm to take its witnesses to Moscow for examination before the arbitral tribunal and to otherwise properly conduct the proceedings there", Indian Kanoon, https://indiankanoon.org/doc/1235641/ (last visited Apr. 24, 2016).

181 Kröll, *supra* note 62, at 343.

182 Int'l Council for Com. Arb., *supra* note 5 at 53.

183 Kröll, *supra* note 62, at 337.

184 *Id.*, at 336.

methods for the constitution of the tribunal.[185] In *National Iranian Oil Co. v. The State of Israel, the claimant requested the French courts to designate an arbitrator for Israel, as the latter objected to appoint an arbitrator. After having stated that the impossibility for a party to access the court or arbitral tribunal due to the lack of assistance and cooperation in the constitution of the tribunal would give rise to the denial of justice; the French Cour de Cassation rejected Israel's appeals against the decisions rendered by the Cour d'Appel de Paris, whereby Israel was requested to appoint an arbitrator*.[186] In the decision, the court emphasized "the state court's mission to assist and cooperate in the constitution of an arbitral tribunal, when there is a connection with France".[187]

The political circumstances at the seat of arbitration, such as wars, conflicts, inaccessibility to the seat of arbitration etc., may also render the arbitration agreement inapplicable; however, if these circumstances already existed or were foreseeable at the time of the conclusion of the arbitration agreement, the latter may be considered binding upon the parties.[188] In *National Iranian Oil Co. v. Ashland Oil*, the United States Court of Appeals for the Fifth Circuit decided that the seat of arbitration could not be separated from the rest of the arbitration agreement as a whole, which gave rise to the result that the arbitration agreement was "incapable of being performed" due to the "impossibility for an American entity to travel to and to engage in quasi-judicial proceedings in Iran" after the Islamic Revolution and the hostage crisis.[189] A similar decision rendered by the *Landesgericht*

---

185 *Id.*, at 337.

186 Cour de Cassation 1e civ., Feb. 1, 2005, Bull. civ. I, No. 404, Cour de Cassation, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/02_15.237_635.html. For the comments on the case, see: http://thouvenin.com/wp-content/uploads/2013/11/20130222-National-Iranian-Oil-Company_HJS.pdf (last visited Apr. 24, 2016).

187 *Ibid.*

188 Kröll, *supra* note 62, at 342.

189 National Iranian Oil Co. v. Ashland Oil, 817 F.2d 326 (5th Cir. Miss. 1987). Although the National Iranian Oil did not resist on Tehran as the seat of arbitration and requested the court to compel arbitration in Mississippi, the court rejected this request with the following statement: "Notwithstanding considerations of "convenience," one cannot reasonably argue that the parties' contract contemplates arbitration in Mississippi. The contract's provision that arbitration was to be in Tehran "unless otherwise agreed" suggests that, were Iran to become inconvenient or unacceptable to one or both parties, no

Kassel concerns an arbitration agreement designating Belgrade as the seat of arbitration.[190] The German court concluded that the party, which initiated the court proceedings, was entitled to terminate the arbitration agreement due to the the consequences of the civil war in Yugoslavia. If the inability to set arbitration into motion arises out of temporary political changes, it would be a better approach for courts to evaluate the arbitration agreement under the category of "incapable of being performed" rather than other exceptions in Article II(3), since it would be possible to start the arbitral proceedings after the minimum standards of security and stability for arbitration are maintained at the seat of arbitration.

The most controversial issue in the sense of incapability of being performed is the lack of sufficient funds to perform arbitration, which corresponds to the impecuniosity of either party to contribute to arbitration costs and expenses. There are two different approaches as regards the consequences of impecuniosity: On the one hand, in the United States, England and France, the impecuniosity is generally not accepted as a reason to render the arbitration agreement unenforceable and the rationale of decisions is based on the principle of *pacta sunt servanda*.[191] On the other hand, in Germany, Austria and India, the right of access to justice is given more weight vis-à-vis the principle of *pacta sunt servanda*, whereby the impecuniosity of a party would either gives the other party an extraordinary right to terminate the arbitration agreement or causes that the arbitration agreement is construed as "incapable of being performed".[192]

In *Janos Paczy V. Haendler & Natermann G.M.B.H.*, the English Court of Appeal found that the impecuniosity of the claimant would not render the arbitration agreement "incapable of being performed", where the claimant was able to get a legal aid for the court proceedings but not funded for the arbitral proceedings.[193] Similarly, in *Pro Tech*

other forum was to be available unless mutually agreed upon. Because arbitration is a creature of contract, we cannot rewrite the agreement of the parties and order the proceeding to be held in Mississippi."

190 Kröll, *supra* note 62, at 341.

191 *Id.*, at 344.

192 *Id.*, at 347.

193 Paczy v Haendler [1981] 1 Lloyds Rep 302 (Buckley and Brightman LJJ).

Indus. v. URS Corp., the United States Court of Appeals for the Eighth Circuit conducted a test under the notion of "unconscionability" and provided that the impecuniosity, which did not exist at the time of the conclusion of the arbitration agreement, did not give rise to the unconscionability.[194]

On the other hand, the German Supreme Court emphasized that obliging the claimant to arbitration in spite of its incapacity to afford the arbitration costs would deprive it of the effective legal protection, which was guaranteed in Article 6 of the European Convention of Human Rights and therefore decided that impecuniosity rendered the arbitration agreement "incapable of being performed".[195] This approach, which is also adopted by the Austrian and Indian courts, is based on the rationale that an arbitration agreement shall not result in a denial of justice.[196]

After careful consideration of these opposing views, the English approach seems to favor the pre-enforcement bias more than the German approach and thus the former view is more in compliance with the objectives of the New York Convention.[197] Even if the German approach is adopted, it should never be interpreted so broadly as to allow opportunistic parties, who create a willful impecuniosity to make the arbitration agreement ineffective or delay the arbitral proceedings.[198]

In any case, if one of the parties objects to the referral of the dispute to arbitration just because of his/her impecuniosity, the other party would always be allowed to pay all costs of arbitral proceedings to prevent the arbitration agreement from being unenforceable under the "incapable of being performed" provision.[199] This is a natural

---

194 Pro Tech Indus. v. URS Corp., 377 F.3d 868 (8th Cir. Mo. 2004).

195 BGH Sept. 14, 2000, III ZR 33/00, OpenJur, https://openjur.de/u/60923.html (last visited Apr. 24, 2016).

196 Bombay HC, Apr. 4, 1977, Indian Organic Chemicals Ltd v Chemtex Fibres Inc, para. 50, N.Y. Convention Guide, http://www.newyorkconvention1958.org/doc_num_data.php?explnum_id=2094 (last visited Apr. 24, 2016). Kröll, *supra* note 62, at 347.

197 Kröll, *supra* note 62, at 349.

198 *Ibid.*

199 *Id.*, at 350.

consequence of the principle that "an impecunious party cannot rely on his own inability to escape from arbitration"[200].

It should never be forgotten that the analysis of Article II(3) concerns the validity of the arbitration agreement, not the enforceability of the final award. For this reason, the inability of a final award to be performed or enforced cannot constitute a ground for a claim concerning the arbitration agreement's incapability of being performed and thus, the arguments based on the inability to perform the future final award have been rejected in the case law.[201] The Italian Supreme Court found that a court cannot decide on the enforceability of a future arbitral award at the referral stage.[202] Similarly, in *Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro*, the court set forth that "the delegates [to the Convention] chose not to limit the mandate to arbitrate to those cases in which it was certain that an arbitral award would subsequently be enforced by the courts".[203] The legislative history of the Convention also proves the pertinence of the case law. According to Haight, the German delegate proposed the amendment of Article II to provide that the enforcement of an arbitral agreement would be contingent upon the enforceability of the future arbitral award; however, "[w]hen the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention".[204]

A controversial issue on the "inoperative" exception is whether the dissolution and reorganization of an arbitration institution named in the arbitration agreement renders the latter inoperative or the agreement preserves its validity through the presumption that the tasks of the dissolved arbitral institution were transferred to the newly established institution and this question arose in particular related with the reorganization of arbitration courts in COMECON countries

---

200 Lamm & Sharpe, *supra* note 2, at 300.

201 Kröll, *supra* note 62, at 327.

202 Lamm & Sharpe, *supra* note 2, at 307.

203 Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 53-54 (3d Cir. V.I. 1983).

204 Haight, *supra* note 126, at 71.

after the dissolution of the Eastern block.[205] As regards the arbitration agreements referring to the Chamber of Foreign Trade of the German Democratic Republic, which was replaced by the Berlin Arbitration Court, Belgian and German courts decided that the parties could no longer be bound by the arbitration agreement due to the dissolution of the institution referred to in the agreement.[206] The German court found that the arbitration agreement was "inoperative", whereas the Belgian court categorized the agreement under the "incapable of being performed" provision.[207] On the other hand, Canadian and Austrian courts upheld the arbitration agreements referring to the dissolved arbitral institutions and decided that the newly established arbitral institutions, which replaced them, had jurisdiction under these arbitration agreements.[208]

6. Conclusion

Article II(3) prescribes that the courts of Contracting States, that are seized of an action, shall refer parties to arbitration in the presence of a valid arbitration agreement and sets forth that the validity and efficacy of the arbitration agreement may be challenged, if it is deemed to be "null and void, inoperative or incapable of being performed". However, the provision neither provides any guidance as regards the scope of these exceptions nor determines the applicable law. Therefore, the case law and scholarly writing are of substantial importance for the interpretation of its scope. The applicable law to Article II(3) should be based on the maximum standard approach, which applies the conflict-of-laws rules to determine the applicable national law, however limits the analysis to internationally neutral defenses and maintains the uniform application by precluding parochial national defenses. Article II(3) concerns the enforcement of arbitration agreements at the pre-award stage, where as Article V(1)(a) concerns the post-award stage. As these two provisions are related to totally different settings, the

---

205 Kröll, *supra* note 62, at 332.

206 Julian D. M. Lew, loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration 158 (2003). Kröll, *supra* note 62, at 332-333.

207 Kröll, *supra* note 62, at 333.

208 CA Ontario, May 30, 2003, Dalimpex Ltd. V. Janicki, [2003] 172 O.A.C. 312, Ontario Courts, http://www.ontariocourts.on.ca/decisions/2003/may/dalimplexC37306.htm (last visited Apr. 24, 2016). Lew, Mistelis, Kröll, *supra* note 200, at 158-159.

application of the choice of law rule in Article V(I)(a) by analogy should be rejected. The pro-enforcement bias of the Convention requires a narrow interpretation of the exceptions, a *prima facie* review of the validity of arbitration agreements by domestic courts and a heavy burden of proof on the party claiming the invalidity of the arbitration agreement.

BIBLIOGRAPHY

Books, Periodical Materials and Articles

- 50 Years of the New York Convention: ICCA International Arbitration Conference (Albert Jan van den Berg ed., 2009).
- Albert Jan van den Berg, The New York Convention of 1958: An Overview.
- Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981).
- Arbitrability: International and Comparative Perspectives (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).
- Conflict of Laws in International arbitration (Franco Ferrari & Stefan Kröll eds., 2011).
- Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).
- G.W. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference 27-28 (1958).
- Gary B. Born, International Commercial Arbitration: Commentary and Materials (2001).
- Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Albert Jan van den Berg ed., 1999).
- Int'l Council for Com. Arb., ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011).
- Julian D. M. Lew, loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration (2003).

- Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases (Albert Jan van den Berg ed., 1991).
- Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).
- Yearbook Commercial Arbitration, Volume 22 (Albert Jan van den Berg ed., 1997).

Works in Collections

- A. Mistelis, *Arbitrability – International and Comparative* Perspectives, *in* Arbitrability: International and Comparative Perspectives (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).
- Abhishek M. Singhvi, *Article II(3) of the New York Convention and the Courts*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Albert Jan van den Berg ed., 1999).
- Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, *in* 50 Years of the New York Convention: ICCA International Arbitration Conference (Albert Jan van den Berg ed., 2009).
- Antonias Dimolitsa, *Seperability and Kompetenz-Kompetenz*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Albert Jan van den Berg ed., 1999).
- Carolyn B. Lamm & Jeremy K. Sharpe, *Inoperative Arbitration Agreements Under the New York Convention*, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).
- Domenico Di Pietro, *General Remarks on Arbitrability Under the New York Convention*, *in* Arbitrability: International and Comparative Perspectives (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

- Dorothée Schramm, Elliott Geisinger & Philippe Pinsolle, *Article II*, *in* Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds., 2010).
- Emmanuel Gaillard, *Efforts by a Party to Seek Intervention by a National Court for the Purpose of Delaying or Disrupting the Arbitration: Laws and Court Decisions in Civil Law Countries*, *in* Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases (Albert Jan van den Berg ed., 1991).
- Leonardo D. Graffi, *The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View*, *in* Conflict of Laws in International arbitration (Franco Ferrari & Stefan Kröll eds., 2011).
- Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, *in* Conflict of Laws in International arbitration (Franco Ferrari & Stefan Kröll eds., 2011).
- Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Albert Jan van den Berg ed., 1999).
- R. Doak Bishop, Wade M. Coriell & Marcelo Medina Campos, *The 'Null and Void' Provision of the New York Convention*, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).
- Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II(3) of the New York* Convention, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

- Youseph Farah & Sara Hourani, *Frustrated at the interface between court litigation and arbitration? Don't blame it on Brussels I! Finding reason in the decision of West Tankers, and the recast Brussels I*, *in* Research Handbook on EU Private International Law (Peter Stone & Youseph Farah eds., 2015).

Works in Periodicals

- Emmanuel Gaillard, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y. L. Rev., Dec. 1, 2005.
- Jack Graves, *Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?*, 23.1 The Am. Rev. of Int'l Arb. 113, 115 (2012).
- John Ja Burke, *A Gateway Question of Arbitrability: The Ambiguity of Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*, 2015 Slovn. Arb. Rev. 3, Selected Works.
- Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28.3 Hous. J. of Int'l L. (2006).
- Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38.25 Ga. J. Int'l & Comp. L. 25, 42 (2009).

Case Law

- Austrian Supreme Court (Oberster Gerichtshof, Oct. 2, 1935, SZ17/131).
- Bakewin and Erie Int'l. Trading v. Sothebys EWHC (QB) [2005] ArbLR 6.
- BGH Sept. 14, 2000, III ZR 33/00.
- Bombay HC, Apr. 4, 1977, Indian Organic Chemicals Ltd v Chemtex Fibres Inc.
- Bundesgericht April 29, 1996, 122 Entscheidungen der Schweizerischen Bundesgerichts III 139.
- CA Ontario, May 30, 2003, Dalimpex Ltd. V. Janicki, [2003] 172 O.A.C. 312.

- Cour de Cassation 1e civ., Feb. 1, 2005, Bull. civ. I, No. 404, L'Etat d'Israël v. National Iranian Oil Company.
- Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. P.R. 1982).
- Lyle v. Bentley, 406 F.2d 325, 328 (5th Cir. Tex. 1969).
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (U.S. 1985).
- National Iranian Oil Co. v. Ashland Oil, 817 F.2d 326 (5th Cir. Miss. 1987).
- Paczy v Haendler [1981] 1 Lloyds Rep 302 (Buckley and Brightman LJJ).
- Pro Tech Indus. v. URS Corp., 377 F.3d 868 (8th Cir. Mo. 2004).
- Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50 (3d Cir. V.I. 1983).
- Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni v. Lauro, 555 F. Supp. 481 (D.V.I. 1982).
- Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. Colo. 1992).
- Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (U.S. 1974).
- Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. Arb/84/3, Award.
- Supreme Court of India, Aug. 12, 2005, Shin-Etsu Chemical Co. Ltd vs M/S. Aksh Optifibre Ltd. & Anr.
- Tribunal Fédéral, Mar. 21, 1995, Insurance Co. v. Reinsurance Co.

Laws, Conventions and Model Laws

- Code de procédure civile (Fr.)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter 'New York Convention' or 'Convention'].
- Swedish Arbitration Act (SFS 1999:116).
- UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

- Vienna Convention on the Law of Treaties, art. 31, May 23 1969, 8 I.L.M. 679.
- Zivilprozessordnung (Ger.)

Internet Resources

- http://alrr.oxfordjournals.org.
- http://www.arbitration-icca.org.
- https://www.courdecassation.fr.
- http://digitalcommons.law.uga.edu.
- http://digitalcommons.tourolaw.edu.
- https://www.gesetze-im-internet.de.
- http://www.hjil.org.
- https://icsid.worldbank.org.
- https://indiankanoon.org.
- http://www.kluwerarbitration.com.
- https://www.legifrance.gouv.fr.
- http://www.lexisnexis.com.
- http://www.newyorkconvention1958.org.
- http://www.ontariocourts.on.ca.
- https://openjur.de.
- http://relevancy.bger.ch.
- http://www.shearman.com.
- http://thouvenin.com.
- http://www.uncitral.org.
- http://works.bepress.com.